UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

BRACE INTEGRATED SERVICE

Employer

and **Case 28-RC-186980**

INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS AND ALLIED WORKERS LOCAL NO. 76, AFL-CIO

Petitioner

DECISION AND ORDER

International Association of Heat & Frost Insulators and Allied Workers, Local No. 76, AFL-CIO (Petitioner) seeks to represent a unit of mechanical insulators, including metal men, and helpers employed by Brace Integrated Service (the Employer) within Petitioner's geographic jurisdiction, which includes the State of New Mexico, Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, and Presidio Counties in the State of Texas, and Archuleta, Costilla, Conejos, La Plata, and Montezuma Counties in the State of Colorado. The petitioned-for unit currently includes approximately 19 employees, all of whom are assigned to one single jobsite, the APS Four Corners Power Plant (the APS Plant) in Fruitland, New Mexico. The Employer contends that the petition should be dismissed on the grounds that: (1) the petition is facially deficient because it fails to specify the geographical scope of the petition-for unit; (2) an election should not be held because of the imminent cessation of the Employer's operations within the geographic scope of the petitioned-for unit; and (3) the petitioned-for unit is inappropriate given its geographic scope.

A hearing officer of the National Labor Relations Board (the Board) held a hearing in this matter in Farmington, New Mexico, on November 7, 2016,[1] and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record evidence, I find that: (1) the petition should not be dismissed based on any facial deficiency; (2) the petition should, however, be dismissed because of the imminent cessation of the Employer's operations within the geographic scope of the petitioned-for unit; and (3) based on an application of relevant Board cases, including the Board's decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), the

[1] All dates refer to 2016.

petitioned-for unit is an appropriate unit for purposes of collective bargaining, although I am dismissing the petition on other grounds.

I. Sufficiency of the Petition

As an initial matter, I will discuss the Employer's contention that the petition should be dismissed because it is facially deficient insofar as it fails to specify the geographical scope of the petitioned-for unit. For the following reasons, I find that the petition is valid and a formal amendment was unnecessary.

On its petition, Petitioner listed Brace Integrated Services as the name of the Employer and the APS Plant as the "address(es) of establishment(s) involved," and it provided the following "description of the unit involved:"

Included: All Mechanical Insulators and Helpers.

Excluded: All others.

At the hearing, Petitioner clarified that it was in fact seeking to represent employees throughout its geographical jurisdiction, and not just at the APS Plant. Nonetheless, Petitioner expressly declined to amend the petition, arguing that, because the Employer performs work in the construction industry, the performance of work at job sites other than the APS Plant is inherent to its business, such that it was not amending but clarifying the petitioned-for unit at the hearing. The Employer argued that the petition was facially deficient due to Petitioner's failure to specify the geographic scope of the petitioned-for unit and that proceeding with a hearing concerning the appropriateness of the unit, as clarified at the hearing by Petitioner, deprived it of due process. The hearing officer decided to proceed with the hearing, permitting both parties to present evidence on the appropriateness of the petitioned-for unit, despite the Employer's objection.

Whether an amendment to the petition is necessary is at my discretion. I find that, under these circumstances and based on the record that was established, none was necessary here. The petition was sufficiently clarified at the hearing, and the parties were able to fully litigate the substantive issues raised by the petition. Accordingly, I will proceed with deciding those substantive issues.

II. Substantive Issues

A. Background

The Employer provides construction services, including mechanical insulation services for heavy industrial and commercial clients, at jobsites throughout the United States. The Employer has been operating its business for about four years. It employs between about 1,500 and 4,000 employees nationwide, with the size of its workforce fluctuating due to the nature of its business.

The Employer maintains its headquarters in Houston, Texas, and has various geographic divisions, including Midwest and Southwest divisions. Each geographic division is self-contained insofar as its supervisory hierarchy and operations, meaning that each division bids on its own contracts and has a separate chain of command. Although the Employer's witnesses indicated that the Employer's website showed the Employer's geographic divisions, it is not clear from that website whether the counties in Colorado included in the petitioned-for unit belong to the Employer's Midwest or Southwest division, though it is undisputed that the majority, if not all, of Colorado belongs to the Midwest division. New Mexico and Texas belong to the Employer's Southwest division.

Aside from the geographical divisions, the Employer also has a distinct heat tracing division that spans the country. The heat tracing division is responsible for procuring heat tracing projects, engineering those projects, and managing those projects through the final installation. Heat tracing electricians belonging to that division install heating elements that regulate temperatures in piping structures, work which requires specialized experience and training. Generally, heat tracing projects also entail work performed by employees working in positions as mechanical insulators, including what the Employer calls metal men. After the heat tracing system is installed, the mechanical insulators wrap the pipes with insulation, and metal men then wrap the insulated pipes with aluminum. The Employer also employs less skilled helpers to perform general labor and insulation work on heat tracing projects and other projects.

Although its operations are structured into geographical divisions and a heat tracing division, the Employer conducts hiring of mechanical insulators and helpers at a local level. For example, at the APS Plant, the Employer's superintendent for the project recruited and hired a new workforce. In doing so, he made calls from a running list of about 300 former insulators across the country with whom he has had experience. The Employer also recruited Navajo employees who make up approximately 25 percent of its workforce on the project in an effort to comply with the Navajo Preference in Employment Act, since the APS Plant is located in the Navajo Nation.

In order to secure contracts, the Employer receives contract documents from potential customers and then undergoes a vetting process, in which the potential customers review its performance records, references, and safety records to determine whether the Employer is qualified to bid on future projects. If the potential customers determine the Employer is qualified and decide to allow it to bid on their projects, they sent it requests for quotation (RFQs) allowing the Employer to bid on the projects. The Employer then vets the RFQs and determines whether the projects fit within the criteria the Employer applies in deciding whether to bid projects. If the Employer decides to bid a project, the potential customer would then decide whether to award the project to the Employer. The Employer can receive anywhere between 3 and 30 RFQs per week nationwide, but it receives very few RFQs for work within the geographic scope of the petitioned-for unit because, with the exception of El Paso, Texas, that geographic area has very low industrial density.

Within the geographic scope of the petitioned-for unit, there is only evidence of the Employer performing work on one project, the project at the APS Plant. On September 20, after

going through the RFQ and bid process, the Employer was awarded a contract to install heat tracing, insulation, and aluminum cladding on pipes at the APS Plant. The project was originally scheduled to run through October 28, but, because of a delay, the end date for the project was changed to November 4. Further, on September 23, APS sent the Employer a change order seeking to expand the contract to encompass heat tracing and thermal insulation on a liquor tank (a large tank filled with caustic chemicals). The Employer bid 800 hours for the additional work on the liquor tank, and, after the Employer and APS negotiated the time and cost for that work, the parties agreed on a completion date of November 18. Because of delays, it is now thought that the project will not be completed until closer to the end of November. The Employer will be drawing down employees, so that only one or two are left by that time. The Employer does not anticipate any changes in that timeframe because it has not received any change orders.

At the conclusion of the project at the APS Plant, the Employer currently has no work scheduled within the geographic scope of the petitioned-for unit, and it has no RFQs or bids outstanding in the area. The Employer had one inquiry within the area, received from Western Refinery in El Paso, Texas, sometime between about January and March. Although the Employer submitted information to allow Western Refinery to determine whether it was qualified to bid, it did not receive further inquiries or an RFQ from Western Refinery. While Petitioner offered some testimony that the Employer's superintendent told an employee there was further work to be done, the superintendent testified that he was referring to the additional 800 hours of work to be done on the liquor tank, and that it was this immediate work, and not some later project, that he was referencing. The superintendent further testified that he would be leaving the Fruitland, New Mexico, area at the end of November and returning to his home in Oklahoma until he is dispatched for another project.

B. Imminent Cessation of Operations

The National Labor Relations Act (the Act) provides that the Board must, upon the filing of a representation petition, to investigate whether a question of representation exists, including by holding an appropriate hearing. 29 U.S.C.§ 159(c)(1). The Act further requires that, [i]f the Board finds…that such a question of representation exists, the Board shall direct an election… and certify the results thereof." *Id.* "The Board has recognized a narrow exception to this statutory mandate, limited to circumstances in which it is reasonably certain that conducting an election will serve no purpose[.]" *Retro Environmental, Inc.*, 364 NLRB No. 70, slip op. at 6 (Aug. 16, 2016). The Board has found such circumstances, justifying the dismissal of petitions, include "when cessation of the employer's operations is imminent, such as when an employer completely ceases to operate, sells its operations, or fundamentally changes the nature of its business." *Id.* (citing *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Martin Marietta Aluminum*, 214 NLRB 646, 646-47 (1974); *Cooper International*, 205 NLRB 1057, 1057 (1973)). The burden is on the party asserting imminent cessation of operations to prove it so. *Retro Environmental, Inc.*, 364 NLRB at slip op. 6. See also, e.g., *Davey McKee Corp.*, 308 NLRB 839 (1992) (Board affirming dismissal of petition based on employer's showing that construction projects were ending, there were no ongoing projects within the geographic area, and there were no outstanding bids on future projects).

I conclude that directing an election would serve no purpose under the Act because record evidence shows that cessation of the Employer's operations within the geographic scope of the petitioned-for unit is imminent. My conclusion is based on the following.

I find that the Employer has held itself out as a contractor performing work in the geographic area at issue and that it is actively seeking work in this area. This finding is based on the Employer's own admission that it would bid on future jobs in this area if qualified in the future, and that the Employer has in fact, sought out limited work in this area already. To that end, the Employer procured the APS Plant contract and engaged in communications seeking work to perform with Western Refinery, located in El Paso, Texas.

However, I further find that evidence shows there is no indication that there will be work available in the near future. In support of this finding, first I recognize that the Employer's current work in this area is scheduled to cease no later than around late November. Second, the Employer has no other ongoing projects in this area. Third, the Employer has not bid on any other projects in this area nor received RFQs allowing it to do so. Thus, I find, just like in *Davey McKee Corp.*, that the Employer has met its burden in showing an imminent cessation of its operations and that dismissal of the petition is appropriate. 308 NLRB 839, 840 (1992).

C. Appropriateness of the Petitioned-for Unit

The Act does not require a petitioner to seek representation of employees in the most appropriate unit possible, but only in an appropriate unit. *Overnite Transportation Co*., 322 NLRB 723 (1996). Thus, the Board first determines whether the unit proposed by a petitioner is appropriate. When the Board determines that the unit sought by a petitioner is readily identifiable and employees in that unit share a community of interest, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that the unit employees could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates that employees in the larger unit share an "overwhelming community of interest" with those in the petitioned-for unit. *Specialty Healthcare*, supra, at 940.

Thus, the first inquiry is whether the job classifications sought by Petitioner are readily identifiable as a group and share a community of interest. In doing so, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002), see also *Specialty Healthcare*, supra, at 942. Particularly important in considering whether the unit sought is appropriate are the organization of the plant and the utilization of skills. *Gustave Fisher, Inc.*, 256 NLRB 1069, fn. 5 (1981). However, all relevant factors must be weighed in determining community of interest.

With regard to the second inquiry, additional employees share an overwhelming community of interest with the petitioned-for employees only when there "is no legitimate basis upon which to exclude (the) employees from" the larger unit because the traditional community-

of-interest factors "overlap almost completely." *Specialty Healthcare*, supra, at 944-945, and fn. 28 (quoting *Blue Man Vegas, LLC. v. NLRB*, 529 F.3d 417, 421-422 (D.C. Cir. 2008)). Moreover, the burden of demonstrating the existence of an overwhelming community of interest is on the party asserting it. *Northrop Grumman Shipbuilding, Inc.*, 357 NLRB 2015, slip. op. at 2017, fn. 8 (2011).

I find that the petitioned-for unit shares a community of interest under the Board's traditional criteria, insofar as their work on the Employer's projects is functionally integrated; they have common supervision when working on the same projects; and there is interchange between mechanical insulators and helpers. Although the Employer argues that the unit must be limited to the APS Plant because the geographical scope of the proposed unit is inconsistent with its organizational divisions, I conclude that the proposed unit is a sufficiently "readily identifiable as a group" to constitute an appropriate unit because it is comprised of employees within a specifically defined (in terms of states and counties), contiguous geographic area, and employees work on discrete, self-contained, and locally staffed and supervised projects within that area. Thus, the petitioned-for unit is not comparable to the unit found inappropriate by the Board in *Bergdorf Goodman*, 361 NLRB No. 11 (2014)

Because the Employer has made no argument that employees in the petitioned-for unit share an overwhelming community of interest with any other group of its employees and the evidence does not establish an overwhelming community of interest, I find that the petitioned-for unit is an appropriate unit for purposes of collective bargaining, although I am, as explained above, dismissing the petition on other grounds.

III. CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[2]

3. Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

[2] I find, based on the stipulations of the parties, that the Employer, Brace Integrated Service, a company with an office and place of business at APS Four Corners Power Plant in Fruitland, New Mexico, has been engaged in the business of providing construction services, including mechanical insulation services, and, in conducting its business during the 12-month period ending October 26, performed services valued in excess of $50,000 in states other than the State of New Mexico.

All full-time and regular part-time mechanical insulators, including metal men, and helpers, employed by Brace Integrated Service (the Employer) in the State of New Mexico, Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, and Presidio Counties in the State of Texas, and Archuleta, Costilla, Conejos, La Plata, and Montezuma Counties in the State of Colorado; excluding all other employees, clerical employees, guards, and supervisors, as defined by the National Labor Relations Act.

5. The petition must be dismissed because it is reasonably certain that conducting an election will serve no purpose because of the imminent cessation of the Employer's operations within the geographic scope of the petitioned-for unit.

IV. ORDER

IT IS HEREBY ORDERED that the petition in this matter is dismissed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **December 2, 2016**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Phoenix, Arizona this 18th day of November, 2016

/s/ Cornele A. Overstreet
Cornele A. Overstreet, Regional Director

Form NLRB-877

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AFFIDAVIT OF SERVICE OF: DECISION AND ORDER

I, the undersigned employee of the National Labor Relations Board, state under oath that on November 18, 2016, I served the above-entitled document by electronic mail upon the following persons, addressed to them at the following addresses:

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November 18, 2016
Date

Christian Zayas, Designated Agent of NLRB
Name

/s/ Christian Zayas
Signature